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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-0590

CLARENCE A. BENNETT, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

SCHOELEN, *Judge*: The appellant, Clarence A. Bennett, appeals through counsel a November 21, 2011, Board of Veterans' Appeals (Board) decision that denied entitlement to a total (100%) disability rating based on individual unemployability (TDIU). Record (R.) at 3-14. Both parties have filed briefs. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). The Board's decision will be reversed and the matter remanded for further proceedings consistent with this decision.

I. BACKGROUND

The appellant had active duty in the U.S. Air Force from June 24, 1966, to March 31,1987, as an Aircraft Maintenance Superintendent and as a Strategic Aircraft Maintenance Technician. R. at 334. In 1977, after the appellant moved heavy crash recovery equipment, he began experiencing low back pain that radiated into his left leg. R. at 339, 366-67, 497-500. He was given medication, traction, bed boards, and heating pads, which did not alleviate his symptoms. R. at 367. A myelogram revealed a possible herniated disc. *Id.* In December 1977, the appellant underwent a laminectomy with excision of a large, bulging disc at the L5 transitional. R. at 366. Following the

surgery, the appellant continued to complain of recurrent low back pain with residual sensory deficit, including numbness in the left leg, thigh, and lateral foot. R. at 344, 456-58, 461, 470, 478-96. The appellant complained of back pain during his August 1986 separation examination. R. at 338-39 456-57. In December 1986, the appellant was given a physical profile because of "chronic" low back pain for the remainder of his active service, which prohibited prolonged standing, walking, and heavy lifting. R. at 344, 456-58, 461.

In April 1987, the appellant filed an application for disability compensation benefits for a low back disability. R. at 328. In a May 1987 VA examination, he had continuous low back pain that extended to his legs, with occasional numbness down the left leg. R. at 312. X-rays of the lumbosacral spine revealed mild dextroscoliosis. R. at 320. The examiner diagnosed status-post L4-5 laminectomy. R. at 315.

In September 1987, a VA regional office (RO) granted disability compensation benefits for "post-operative status, herniated nucleus pulposus (HNP) L5" and assigned a 10% disability rating, effective April 1, 1987. R. at 310. The appellant did not appeal this RO decision.

In February 2005, the appellant sought medical treatment for back and left hamstring pain. R. at 166. A February 24, 2005, magnetic resonance imaging (MRI) of the appellant's lumbar spine revealed multilevel discogenic disease with a "prominent" bulging disc at L4-S1 that was "moderately compressing the thecal sac[,] causing moderate to severe lateral recess narrowing." R. at 175-76. The appellant's doctors referred him to Dr. Montgrief at the Ohio Neurosurgical Institute. R. at 167.

During an April 2005 consultation with Dr. Montgrief, the appellant reported that his back pain began in 1977 after he tried to push a 3,000-pound piece of steel. R. at 169-70. Over the years, the appellant reported that his back pain had interfered with his ability to work and that his symptoms were worsened by prolonged standing, sitting, or lifting. *Id.* The appellant stated that his most recent flareup occurred in February 2005 and involved sharp, throbbing, severe, and tight pain with intermittent numbness. *Id.* Dr. Montgrief's impressions were that the appellant had "lumbar facet arthropathy, lower back pain, and lumbar sprain/strain." R. at 170. Dr. Montgrief referred the appellant for physical therapy and lumbar facet injections. *Id.*

On April 21, 2005, the appellant began physical therapy at Pomeroy Therapeutics. He reported that he suffered "episodic pain" as the result of a flareup that occurred in February 2005.

"[B]efore [this] flareup[,] he was walking five miles and working out on his bow flex." *Id.* An electromyography (EMG) comparison of the left lower extremity with the right showed no "definitive electrophysiologic abnormality." R. at 173. The examiner recommended physical therapy and noted that the appellant did not tolerate "prolonged positions." R. at 194. During the summer and fall of 2005, the appellant had 12 sessions of physical therapy, multiple injections into his lower back, and received a transcutaneous electrical nerve stimulator (TENS) unit to help alleviate his back pain. R. at 180-99.

In June 2005, the appellant filed a rating increase claim for his back disability. R. at 265-66. He reported that for the past 28 years, he had been "living with constant [p]ain in my lower back, left hip and leg." R. at 265. He also noted that he had retired early from his job in 2003 "because of increasing back pain." *Id.* Subsequently, he claimed entitlement to disability compensation benefits for left hip and left leg disabilities, as secondary to his low back disorder. R. at 238.

In October 2005 and February 2006, the appellant filed formal applications for TDIU, stating that he last worked full time in September 2003. R. at 160-61, 236-37. He noted that his disability began affecting his full-time employment in May and June 2003, several months before he chose to retire early because of his disability to his lower back, left hip, and left leg. R. at 159-160, 236-37. He stated that prior to retiring, he had never missed a day of work or used any sick leave. R. at 163. The appellant reported that he could "function with limits," but he could not walk, sit, or stand for long periods (15-30 minutes maximum) because of "ongoing" pain in his lower back, left hip, and hamstring and that he could only do "minimal" lifting and "limited" bending and stooping. R. at 161. He also reported difficulty sleeping, because his pain forced him to get up three and four times each night. *Id.*

In response to a question on VA Form 21-4192, "Request For Employment Information In Connection With Claim For Disability Benefits," regarding whether the appellant "retired on disability," the appellant's employer indicated that the appellant took an "early retirement" at "age 55 with ten years" and received a monthly pension benefit. R. 98, 158. His employer also noted that in the last year preceding the date of his retirement, the appellant had not taken any sick leave. R. at 98. On July 7, 2006, the appellant underwent a VA medical examination. R. at 117-21. The examiner reported that, although he did not have the appellant's claims file, he reviewed copies of service medical records and private treatment records that the appellant brought to the examination.

R. at 117. The examiner noted that the appellant reported that he had to medically retire from his last full-time employment because of back problems. *Id*. The appellant reportedly had difficulty at his last job because it required him to ride in a car three to four times a week for two to three hours each time. R. at 117. He stated that at first this constant sitting was not "too bad," but that the pain worsened over time.

He reported that his low back pain, which he described as being on a level 8 out of a scale of 10, radiated into his left buttock and the posterior aspect of his left thigh to his knee. R. at 118. He had tried several modalities to alleviate his pain, including injections, physical therapy, muscle relaxers, and electrical stimulation. *Id.* He estimated that between February and October 2005, he was continuously going to physical therapy or doctor's appointments. *Id*. However, he never received more than temporarily relief from his pain, and the pain specialist told him that he could not receive more back injections. *Id.* He had taken Vicodin in the past, and he was currently taking 800 milligrams of Motrin. *Id.*

He was able to perform his own activities of daily living, including eating, grooming, bathing, toileting, and dressing. *Id.* He reportedly experienced flareups that were associated with physical activity at least four to five times a week. During the flareups, his pain increased to a level of 9 out of a scale of 10. *Id.* As a result of the flareups, he experienced functional impairments. *Id.* He estimated that he could walk two to three city blocks before he would have to rest because of back pain. *Id.* If he had to do any significant walking, he would wear a back brace. *Id.*

During the physical examination, the examiner noted that the appellant showed "significant pain with range of motion testing." R. at 119. He was able to flex his back forward from 0 to 70 degrees and extend his back from 0 to 20 degrees.[1] *Id.* He experienced pain throughout the range of motion with both flexion and extension. *Id.* The examiner stated that repetitive motion testing of the appellant's lumbar spine was "nearly impossible" and produced "worsening pain, weakness, fatigability and lack of endurance." *Id*. The appellant had "mild global paraspinous muscle tenderness" and "mild pain with palpation of the left S1 joint." *Id.* He also had positive straight leg

[1] VA considers normal flexion of the back to be from 0 to 90 degrees and normal extension of the back to be 0 to 30 degrees. 38 C.F.R. § 4.7a, Plate V (2013).

testing on the right leg at 60 degrees and positive straight leg testing on the left leg at 45 degrees. *Id*. X-rays of the back showed degenerative changes in the lumbar spine with scoliosis. R. at 120.

The examiner diagnosed the appellant with "residual spinal disc condition with left lower extremity pain, burning and numbness and tingling clinically consistent with an L5 radiculopathy of the left leg." R. at 120. The examiner opined that because the appellant's current complaints of radicular pain were similar to those complaints of radicular pain preceding and following disc herniation surgery during service, it was "more likely than not that the [current] radicular symptoms . . . were related to his spinal disc condition." *Id.* He further opined that the appellant's "back pain subjectively has worsened to the point of being quite severe as well as caused his medical retirement from his civilian job." *Id*.

On July 20, 2006, the RO increased the appellant's disability rating to 40% for his low back. R. at 104. The RO also awarded the appellant disability compensation benefits for left lower extremity radiculopathy and assigned a 10% disability rating for that condition. *Id*. However, the RO denied the appellant entitlement to TDIU. *Id*. The appellant appealed the RO decision by filing an NOD, and perfected his appeal after the RO issued a Statement of the Case. R. at 60-83, 88.

On December 20, 2010, the Board denied the appellant's claims for a disability rating increase in excess of 40% for the low back disability and 10% for radiculopathy of the left lower extremity. R. 21-40. The Board remanded the TDIU issue to the RO for a VA examination "to evaluate the effects of the appellant's service-connected disabilities upon his ability to obtain substantially gainful employment." R. at 40-45. Additionally, the Board concluded that "referral of the [TDIU] claim to the Director of the VA Compensation and Pension Service for extra-schedular compensation is warranted" because "this case presents unusual or exceptional circumstances" as "there is evidence indicating that [the appellant] stopped working in 2003 due to his back disability and residuals resulting therefrom." R. at 42. The appellant did not appeal the Board denial of his schedular rating increase claims to this Court.

On January 6, 2011, the appellant underwent a VA general medical examination. R. at 595-601. The examiner stated that the "purpose of this examination is to evaluate the effects of the veteran's service-connected back disability and radiculopathy of the lower left extremity and his ability to obtain substantially gainful employment." R. at 595. The appellant reported that he sought an early retirement and stopped working full time because of his back. R. 596. He stated that his back

and radiculopathy disabilities had worsened since his 2006 VA examination. *Id.* For example, he currently had pain radiating into both lower extremities with numbness. *Id.* He also complained of daily low back pain, which ranged from "moderate to severe." *Id.* He stated that in the past 12 months, he had no incapacitating episodes of back pain. *Id.* However, he reported that he was experiencing multiple flareups each day that are severe and sometimes lasted for the rest of the day. *Id*. The flareups were precipitated by prolonged walking, prolonged standing, prolonged sitting. *Id.* During the flareups, he experienced limitation of motion and functional impairment with pain on ambulation, stiffness, fatigue, spasms, weakness, decreased motion, and numbness in his extremities. *Id.* He reported that rest and medication alleviated the flareups. *Id.* He was taking 800 milligrams of Motrin three times a day and 10 milligrams of Flexeril, as needed, twice a day. *Id.*

The appellant had diminished pinprick sensation on the bilateral aspects of his left lower extremity, which the examiner noted was consistent with L5 radiculopathy. R. at 597. He had difficulty walking on his heels and on his toes, after taking only a few steps. *Id.* He had an antalgic gait. *Id.* On range-of-motion testing of the back, the appellant had 45 degrees of flexion, 20 degrees of extension, 15 degrees of right and left lateral flexion.[2] *Id.* The examiner observed that during the range of motion testing, the appellant suffered pain at the "terminal end ranges of motion." R. at 598. The diagnosis was "[l]umbar spine degenerative disk disease and scoliosis with radiculopathy." R. at 600. In that portion of the examination, labeled "[r]equest medical opinion," the examiner opined that the appellant "is precluded from physical and sedentary employment at this time due to service-connected condition, as he is unable to engage in prolonged standing, prolonged walking or prolonged sitting." R. at 600-01.

On August 3, 2011, the Director of the Compensation and Pension Service denied the appellant entitlement to TDIU under 38 C.F.R. § 4.16(b). R. at 589-90. R. at 589. The Director rejected the January 2011 VA examiner's opinion because "the objective physical findings on [that] medical examination and in the other available treatment records do not demonstrate that the [appellant's] service[-]connected conditions alone prevent him from engaging in all types of work related activities." R. at 590. Additionally, the Director pointed to other factors warranting a denial

[2] The VA considers normal lateral flexion to be from 0 to 30 degrees. 38 C.F.R. § 4.71, Plate V (2012).

of TDIU, including the lack of evidence of "significant medical treatment in recent years" and the lack of "objective" evidence showing that the "appellant's disability interfered with his past employment or caused him to retire from work." *Id.*

On November 21, 2011, the Board issued the decision here on appeal denying the appellant entitlement to TDIU. R. at 3-16. The Board found that the appellant's service-connected disabilities did not preclude him from securing and following a substantially gainful occupation consistent with his education and work experience. R. at 4.

II. ANALYSIS

Total (100%) disability ratings will be assigned "when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." 38 C.F.R. § 3.340(a) (2013). A total disability rating may be assigned under a diagnostic code (DC) where the DC associated with a disability prescribes a 100% disability rating. Additionally, regulations provide two methods by which TDIU may be awarded. Under the first, TDIU may be assigned to a veteran who is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities" provided that he has received a disability rating of 60% or greater, or if he is service connected for two or more disabilities, at least one of those disabilities has been assigned a disability rating greater than 40%, and the combined disability rating for all disorders is at least 70%. 38 C.F.R. § 4.16(a) (2013). Alternatively, for claimants who fail to meet the percentage thresholds set forth in § 4.16(a), the matter of a TDIU rating should be referred to the Director of the Compensation and Pension Service for extraschedular consideration "when it is found that the claimant is unemployable by reason of service-connected disabilities." 38 C.F.R. § 4.16(b).

Although the Board may not assign an extraschedular rating in the first instance, it must specifically adjudicate whether to refer a case for extraschedular evaluation when the issue is either raised by the veteran or is reasonably raised by the evidence of record. *See Barringer v. Peake*, 22 Vet. App. 242 (2008). After a referral has been made and the Director of the Compensation and Pension Service has made a determination regarding TDIU, the Board has jurisdiction to review that determination on a de novo basis. *See Anderson v. Shinseki*, 22 Vet.App. 423 (2009).

Entitlement to TDIU presupposes that the rating for the veteran's condition is less than 100%, and that TDIU is appropriate because of subjective factors that the objective rating does not consider. *Vettese v. Brown*, 7 Vet.App. 31, 34-35 (1994). The central inquiry in any TDIU case is "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). A Board determination on an increased disability rating, to include a rating of TDIU, is a finding of fact, reviewed under the "clearly erroneous" standard. *Fenderson v. West*, 12 Vet.App. 119 (1999). Under this standard, a finding of fact ""is clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Prior to reaching the merits of the appellant's entitlement to TDIU, the Board concluded that VA had complied with its duty to assist. R. at 6. Specifically, the Board found that the January 2011 VA examination report, which concluded that the appellant was precluded from physical and sedentary employment was "adequate as the medical opinions and findings contained therein are predicated on a review of the [appellant's] claims file." *Id.* Further, the Board found that the "examination report considers all of the pertinent evidence of record and statements of the [appellant], and it provides a rationale for the opinion stated." *Id.*

Regarding the merits of the appellant's entitlement to TDIU, the Board found that § 4.16(a) is not applicable because the appellant's disabilities do not meet the disability rating percentage requirements.[3] R. at 9. Further, the Board concluded that the appellant did not qualify for a TDIU rating under § 4.16(b) because the preponderance of the evidence was against finding that he is unable to obtain or maintain any form of substantially gainful employment based upon service-connected disabilities alone. R. at 4-5.

The Board gave two reasons for rejecting the 2011 VA examiner's opinion that the appellant was precluded from physical and sedentary employment because he could not perform prolonged

[3] The appellant does not challenge the Board's determination that § 4.16(a) is not applicable.

standing, prolonged walking, or prolonged sitting.[4] First, relying on *LeShore v. Brown*, 8 Vet.App. 406, 409 (1995), the Board seemed to find that the 2011 VA's examiner's conclusion was not competent medical evidence. The Court agrees with the appellant that the Board's reliance on *LeShore* is misplaced. In *LeShore*, the medical examiner reported the claimant's lay history of back pain and, based solely on that report, diagnosed chronic back pain. *Id.* *LeShore* held that "a bare transcription of a lay history is not transformed into 'competent medical evidence' merely because the transcriber happens to be a medical professional." *Id.* (citing *Layno v. Brown*, 6 Vet.App. 465, 469 (1994) ("[I]n order for any testimony to be probative of any fact, the witness must be competent to testify as to the facts under consideration.")). However, the Court further held that a physician may provide competent testimony based on lay history when he "filter[s], enhance[s], or add[s] medico-evidentiary value to the lay history through [his] medical expertise." *Id.*

Here, the VA examiner did discuss the appellant's self-reported limitations on his ability to perform various physical activities, such as walking, standing, and sitting. However, the VA examiner did not simply restate the appellant's lay descriptions. The VA examiner also reviewed the appellant's claims file, medical records, x-rays of the appellant's back and conducted a physical examination of the appellant, including range-of-motion testing. R. at 64. Then, in the section of his medical report entitled "requested medical opinion," the VA examiner opined that the appellant was unemployable because he could not perform prolonged standing, walking, or sitting. Unlike the doctor in *LeShore*, the VA medical examiner here rendered a medical opinion based on more than the appellant's statements. Rather, the VA examiner's opinion "added medico-evidentiary value" to the appellant's lay statements, thereby satisfying *LeShore*'s test for competence. *LeShore*, *supra*.

The Board also stated that the VA examiner's 2011 opinion that the appellant was not employable was contradicted by the VA examiner's statement that the appellant could perform the activities of daily living.[5] The Court agrees with the appellant that this rationale is not a sufficient

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[4] The Board also stated that it was rejecting the 2006 VA examiner's opinion for similar reasons. R. at 12.

[5] Activities of daily living are daily activities for self-care such as eating, bathing, and dressing. MedicineNet.comhttp://www.medterms.com/script/main/art.asp?articlekey=2152 (accessed June 18, 2013).

basis upon which to reject the 2011 VA examiner's opinion. It does not follow that the physical activities required for eating, dressing, grooming oneself, or performing household activities can be equated with *prolonged* sitting, *prolonged* walking, and *prolonged* standing on a daily basis. *Cf. Washington v. Derwinski*, 1 Vet.App 459, 465 (1991) (rejecting the Board's conclusion that because the appellant attended school he was employable because "the skills needed to attend school are different from the skills needed to compete successfully in the workplace").

After rejecting the 2011 favorable medical opinion, the Board concluded that the appellant was not entitled to TDIU under § 4.16(b) because he failed to either show that the "schedular ratings [for his disabilities] are an inadequate basis upon which to rate his [disabilities]" (R. at 12), or that the circumstances involved in his claim are "so exceptional as to warrant deviation from the standard rating criteria" (R. at 13). Here, the Board appears to have conflated the standards for an extraschedular disability rating under 38 C.F.R. § 3.321(b) and TDIU under § 4.16(b).[6] The

[6] The Board pointed to a number of factors that supported its conclusions that the appellant failed to show that the schedular ratings for his disabilities were inadequate and that his claim did not involve exceptional circumstances warranting deviation rating criteria: (1) Assignment of less than the highest schedular ratings for the appellant's disabilities and his failure to appeal these ratings; (2) the "absence of evidence" of medical treatment, other than medication, from 2005 until the present; (3) the "absence" of "objective" evidence showing that the appellant's service-connected conditions interfered with his ability to perform his last job"; and (4) "the absence of evidence from his employer indicating his disabilities played a role in his ultimate termination of employment." R. at 2012-13.

The Court is not persuaded that any of these factors provide a sufficient basis upon which to deny the appellant's TDIU claim. For example, there is no requirement under § 4.16(b) that a claimant must receive the highest disability rating allowable for each of his service-connected disabilities. Indeed, the only criteria for entitlement to TDIU under § 4.16(b) is that a claimant's unemployability is attributable to his service-connected disability.

Similarly, § 4.16(b) contains no requirement that a claimant receive medical treatment as a prerequiste for TDIU. Thus, the "absence of evidence" of medical treatment for the appellant's disability is not a sufficient basis upon which to determine that the appellant is employable. Additionally, there is no indication that the appellant was not following a recommended course of medical treatment. In fact, the record shows that after the appellant filed his TDIU claim, he completed a prescribed course of physical therapy, used a TENs unit, injections, and pain medication.

Finally, there is no requirement under § 4.16(b) that the appellant provide "objective"

regulations and caselaw are clear that TDIU and extraschedular evaluation consideration have separate criteria. *Kellar v. Brown*, 6 Vet.App. 157, 164 (1994).

Under § 3.321(b) an extraschedular rating is available "in exceptional cases where the rating is inadequate." *Thun v. Peake*, 22 Vet.App. 111, 114 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). To determine that an extraschedular referral is warranted, the Board must determine that the schedular evaluation under which the claimant is rated does not contemplate the claimant's level of disability and symptomatology, *and* that the claimant has an "exceptional disability picture exhibited by factors such as 'marked interference with employment' and 'frequent periods of hospitalization.'" *Id.* By contrast, under § 4.16(b), the Board does not have to review the disability rating schedule and make any such determination or look to see whether the claimant's disability picture is exceptional in any way. Rather, TDIU may be assigned when the veteran essentially is unemployable (i.e., "unable to secure or follow a substantially gainful occupation") as a result of his service-connected disabilities. *See Kellar*, 6 Vet.App. at 162; *Standon v. Brown*, 5 Vet.App. 563, 564-70 (1993) (issue of extraschedular evaluation is separate from issue of TDIU rating).

Therefore, the Board's inquiry is limited to determining whether the appellant's service-connected disabilities render him unemployable. *Hatlestad, supra.* By denying the appellant TDIU because he did not show that the disability rating schedule is inadequate or that he has exceptional circumstances surrounding his disability to deviate from the disability rating criteria, the

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evidence from his employer showing that his disabilities either "interfered" with work or "played a role in his termination from employment." Thus the "absence" of this evidence cannot provide a basis for denying the appellant's claim. The issue before the Board was whether in 2005, at the time that the appellant applied for TDIU, and at any time during the pendency of that claim, was he unemployable because of his service-connected disabilities. The Board has not provided a sufficient reason for denying the appellant's claim based on his previous employment that ended two years prior to filing his TDIU claim. Additionally, even if the Board's inquiries into these areas were key to its ultimate conclusion regarding the appellant's employability, the Board never found that the appellant's statements were not credible, and VA law generally does not require that a claimant submit "objective" evidence to corroborate his lay statements. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) ("'[C]ompetent lay evidence can be sufficient in and of itself'" to support a finding of service connection) (quoting *Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006)).

Board has imposed requirements that do not exist under the regulation. *See Drosky v. Brown*, 10 Vet.App. 251, 255 (1997) (finding legal error where the Board, "in essence, impermissibly rewrote" the regulation by considering factors wholly outside the rating criteria); *Otero-Castro v. Principi*, 16 Vet.App. 373, 382 (2002) (holding that the Board's consideration of factors that were outside the rating criteria could not be a basis for denying the appellant a rating increase); *Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (citing *Pernorio v. Derwinski*, 2 Vet.App. 625, 628 (1992), and concluding that "Board's consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law").

Reversal of the Board's finding that the appellant's service-connected disabilities do not preclude him from securing or following a substantially gainful occupation is the appropriate remedy in this case. Here, the record contains the 2011 VA examiner's opinion that the appellant is incapable of physical or sedentary work because he is unable to perform activities such as prolonged walking, prolonged standing, and prolonged sitting. The Board has given insufficient reasons for rejecting the 2011 VA examiner's opinion. Additionally, the Board has improperly denied the appellant's claim by imposing requirements that do not exist for establishing entitlement to TDIU under § 4.16(b). For these reasons, the Court is firmly convinced that the Board made a mistake and finds that the Board's conclusion that the appellant is not entitled to TDIU is clearly erroneous.[7] *Gilbert*, *supra*.

[7] The Court has considered the Secretary's argument that the Board decision should be vacated and the matter remanded because the Board relied on the Director of the Compensation and Pension Service's conclusion that the appellant was not entitled to TDIU, and, in turn, the Director failed to consider the 2006 VA examiner's opinion. The Court is not persuaded by this argument. Once the Director has made a determination regarding TDIU, the Board has jurisdiction to review that determination on a de novo basis. *See Anderson, supra*. It is clear that in exercising its de novo authority, the Board considered the evidence, including the 2006 VA examiner's opinion, and gave a statement of reasons or bases for its conclusion that the appellant was not entitled to TDIU.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Court will REVERSE the November 21, 2011, Board decision denying the appellant entitlement to TDIU and remand the matter for further proceedings consistent with this decision.

DATED: July 2, 2013

Copies to:

Patrick Berkshire, Esq.

VA General Counsel (027)